

1 the question of duty to defend. I mean, if there is
2 someone at Black & Decker who says "absolutely, never
3 did it, I always have everything to go to Burke's, even
4 told them we wanted it to go to Burke's" and then there's
5 somebody who says "uh-uh, we took it to BROS or Regal,"
6 well, I don't resolve that and you don't resolve that.
7 What you do is offer a defense until it is determined.

8 MR. LEPORE: Okay, I understand that. All
9 right. Let me go on, because I can understand your
10 point, Your Honor. I respectfully disagree. But here's --

11 THE COURT: Well, is there something out
12 that says that that isn't what happens under these
13 circumstances, some case that says that that isn't what
14 happens?

15 MR. LEPORE: Your Honor, I come back to --
16 Yes. And here's where we are with this: Your focus
17 right now is on the duty to defend.

18 THE COURT: Well, it is.

19 MR. LEPORE: And my focus --

20 THE COURT: Let me just go back to Universal
21 Underwriters --

22 MR. LEPORE: Yes.

23 THE COURT: -- the most recent case that you've
24 called to my attention --

25 MR. LEPORE: Yes.

1 THE COURT: -- talking about an exception.
2 And it is uncontroverted evidence.

3 MR. LEPORE: Yes.

4 THE COURT: So if there's some dispute, then
5 that exception isn't in play.

6 MR. LEPORE: I understand that. Now, let me
7 point to the uncontroverted absolute answer. It is in
8 Volume 30-001. It is a letter from Black & Decker's
9 insurance broker, Alexander, dated October 7th, 1994, in
10 which it responds to Liberty Mutual's questions after
11 Liberty -- just to backtrack for a second, Your Honor.
12 After Liberty Mutual became aware of this claim in March
13 of '94, they sent out the acknowledgment letter and
14 asked for certain information. The classic request for
15 information is the years that they were at the site. In
16 response to that, on October 7th, 1994, Black & Decker's
17 broker said, "It does not predate 1973." Now, that's
18 uncontroverted. There is nothing -- this is an
19 admission from them that nothing was sent to the BROS
20 site before 1973.

21 THE COURT: You mean if someone writes back to
22 their insurer that "I didn't hit the little kid, I'm
23 telling you that as emphatically as I can," even though
24 somebody else out there says that I did, that I have
25 an alibi and that, as a consequence, you don't have to

1 provide a defense?

2 MR. LEPORE: Well, that's a fair point.
3 But then they supply the information, the backup
4 information.

5 THE COURT: Right. And, so, I provide the
6 letter from my girlfriend who says --

7 MR. LEPORE: But they won't have that.

8 THE COURT: -- I was somewhere else on that
9 occasion.

10 MR. LEPORE: I understand your point. But --
11 and I understand it completely, Your Honor. But they
12 have to come up with something. They can't just say,
13 "yes, well, that's true, but maybe there was something
14 else." They haven't done that. They come up with a
15 guy whose name is Goldstein saying that "yes, maybe," but
16 there's no connection between A&A and BROS.

17 THE COURT: He didn't parachute in there. The
18 guy whose name was Goldstein wasn't somebody walking by
19 the BROS site. He's the son of the owner.

20 MR. LEPORE: Right. I understand that. But
21 let's look at -- again, if we're going to deal with the
22 charging documents, all right --

23 THE COURT: Right.

24 MR. LEPORE: -- what's in the charging
25 documents about Black & Decker? Nothing. They don't

1 even reference Black & Decker, right?

2 THE COURT: When you say "charging documents,"
3 you mean the two complaints?

4 MR. LEPORE: Right.

5 THE COURT: Okay. So --

6 MR. LEPORE: The complaints are irrelevant.

7 THE COURT: Well, no, they are not irrelevant.
8 They shape the area of dispute and they allege that
9 there is a right on the part of EPA. And then the PRPs
10 bring their own lawsuit or the first tier bring their
11 own lawsuit alleging a right to recover for whatever
12 costs of remediation they have. So, that sets the
13 broader playing field. And that broader playing field
14 extends beyond 1973.

15 MR. LEPORE: I will acknowledge that the two
16 complaints beyond -- but the connection is -- the
17 question is what is Black & Decker's connection to that?

18 THE COURT: Okay. And then they get the
19 letter from -- is it Mr. Hyatt --

20 MR. LEPORE: Yes. That's correct.

21 THE COURT: -- that fellow who represents as
22 current counsel for the PRPs. You know, kind of border
23 state gentility which you call an invitation. I'm not
24 sure that it falls quite in that category. But in any
25 event, just looking for a way in which he characterized

1 it --

2 MR. LEPORE: I think he says "we invite you to
3 participate."

4 THE COURT: He does. But he also --

5 MR. LEPORE: It's on the second page of the
6 information you're looking for at the bottom, "In lieu
7 of" --

8 THE COURT: Right. But he's got a broader
9 statement of what it is that he thinks Black & Decker is
10 in for. It's not quite in English or at least there are
11 a series of typographical errors, I suppose. I'm just
12 searching for the particular language because I made
13 notes of it just this morning. Well, I can't put my
14 hands on it right now, I'm afraid. But he does not
15 foreclose anything after -- anything before 1973 for the
16 potential obligation of BROS --

17 MR. LEPORE: Black & Decker.

18 THE COURT: -- of Black & Decker, does he?

19 MR. LEPORE: I will acknowledge that, Your
20 Honor. That is not foreclosed.

21 THE COURT: So here is what you have. You
22 have something that says you may be in the ball park.

23 MR. LEPORE: Yes.

24 THE COURT: And Black & Decker vigorously
25 saying, "uh-uh, we weren't there" or "at least if we

1 were there, we were there after 1973." But that's
2 the state of the record at that point.

3 MR. LEPORE: Agreed.

4 THE COURT: A potentiality and a denial. That
5 seems classic duty to defend.

6 MR. LEPORE: Okay. Let me address those
7 points and I understand your point. It's well taken,
8 Your Honor. Let's step back for a minute.

9 Understanding that it is Black & Decker's
10 obligation and burden to establish a claim within
11 coverage. All right. We understand that. Assume for a
12 moment -- and I don't acknowledge this, but assume that
13 that letter and those underlying complaints are a suit
14 that would trigger a duty to defend analysis.

15 THE COURT: Yes.

16 MR. LEPORE: Is a duty to defend triggered in
17 March of '94? And the answer to that question is no.
18 And the reason for that, Your Honor, is because if you
19 look at that letter and you look at the underlying
20 complaints, at anyone's reasonable understanding or
21 reading of that, it alleges long-term contamination.
22 There's no doubt about it. They're alleging that it's a
23 dump site that's contaminated over decades.

24 THE COURT: All right.

25 MR. LEPORE: All right. So, assume for a

1 moment that we jump to the pollution exclusion. And
2 before we get to the pollution exclusion, of course we
3 have to deal with whether or not it's an accident --

4 THE COURT: We're talking about '70 to '71?

5 MR. LEPORE: Exactly. So the question then --
6 we'll ignore the pollution exclusion just for a minute.
7 Assume that we're dealing with an accident or an
8 occurrence, right, which is the language. At '70 to '71
9 was the occurrence language.

10 THE COURT: Yes.

11 MR. LEPORE: It requires an accident. Okay.
12 Is there anything in there that could be fairly read to
13 be an accident? It describes in great detail
14 contamination of a long-standing event. The case law in
15 Maryland is clear there is no coverage for gradual
16 pollution under Maryland law. We have cited numerous
17 cases in that regard.

18 THE COURT: Well, but let me step back on
19 that. If I don't accept the sudden and accidental
20 exception --

21 MR. LEPORE: Yes.

22 THE COURT: -- being read in quite the way
23 you do --

24 MR. LEPORE: Yes.

25 THE COURT: -- then we're really back to you

1 had a duty to defend, aren't we?

2 MR. LEPORE: No. Here's the -- I think --

3 THE COURT: If I say, well, sudden and
4 accidental, that's giving a capacious reading. I may
5 not because I may find that that has a resonance here.
6 But that really is focused on a period after 1971,
7 right?

8 MR. LEPORE: Yes. I agree with that.

9 THE COURT: So, let's talk about '70 to '71.

10 MR. LEPORE: That's what I was talking about.
11 It's still an occurrence-based policy, Your Honor. In
12 order to -- before you get to the exclusions, you have
13 to figure out what's covered. And in order for it to
14 be covered, they've got to establish that there's an
15 occurrence alleged. In order to establish that an
16 occurrence has been alleged, they have to at least argue
17 that there was an accident. There is no accident that
18 could be fairly read into the underlying documents.
19 This was ongoing pollution on a regular basis. Maryland
20 does not recognize that for coverage.

21 THE COURT: What do I do with the June 1971
22 broken nozzle at the storage tank?

23 MR. LEPORE: Okay. That's another good
24 question. Assume for a moment that the pollution
25 exclusion is in effect from '71 on. Just assume that.

1 The question then becomes was the June '71 event a
2 sudden and accidental event within the terms of the
3 policy. First of all -- and, again, you won't know
4 this, obviously, from looking at the documents that were
5 given to us in March of '94 because there's no evidence
6 of any June '71 accidental event. You need to look at
7 extrinsic evidence. Okay.

8 What is extrinsic evidence regarding the BROS
9 site that's important? This BROS site was probably one
10 of the worst sites in the country. And what was the
11 central focus of the pollution? It was a lagoon in the
12 middle of the site that was about 12-1/2 acres in size.
13 It contained over 70 million gallons of liquid waste,
14 another 2-1/2 million gallons of petroleum waste, over
15 72-1/2 million gallons of waste in this 12-1/2-acre size
16 lagoon. What happened in June of '71? As best can be
17 determined -- and for purposes of summary judgment, this
18 is what I understand it to be -- one of the tanks leaked
19 approximately 59,000 gallons. Where did it go? It went
20 right into the lagoon. That's where it was designed to
21 go. What was the pollution event? And assume for a
22 moment that it was a sudden and accidental event.
23 There couldn't be anything that was more de minimis than
24 a 59,000 gallon leak into a 72-1/2 million gallon
25 lagoon. The math ends up to be less than .07 percent.

1 Now, if there's anything that's de minimis, it's
2 something that's less than .1 percent. And, again,
3 we're talking about unrebutted, uncontroverted evidence.
4 That's what our experts say. That's what you have
5 before you, Your Honor. This is a drop in the bucket.

6 THE COURT: Yes. That aspect of it is a
7 little different. That is, that your expert is saying
8 that. You know, one way of looking at it is 59,000
9 gallons is a fair amount. Now, if you say, "well, you
10 know, among PRPs, then, particularly a modest PRP like
11 this, it's not much." But I guess I want to go back
12 to this. Maybe I'm misunderstanding and I want to
13 understand more fully --

14 MR. LEPORE: Yes.

15 THE COURT: -- because I don't think I've
16 looked at this as carefully on this issue as I should
17 have. Prior to '71 --

18 MR. LEPORE: Yes.

19 THE COURT: -- there has to have been an
20 occurrence.

21 MR. LEPORE: Yes.

22 THE COURT: You're saying that Maryland law
23 will not recognize, as some law does, this kind of
24 accretion of exposure to waste as an occurrence -- that
25 is, someone comes and they dump on a periodic basis,

1 they dump at the location.

2 MR. LEPORE: Well, that's what Alcolac
3 stands for.

4 THE COURT: Well, yes and no.

5 MR. LEPORE: It says "no occurrence where
6 pollutants escaped over a period of years." That's
7 the Maryland case. Now, the reason that Black & Decker
8 wants the Alcolac case is because of the dicta
9 regarding the deletion endorsement, but it's different
10 language. But they ignore the primary holding, which is
11 that there's no occurrence where the pollutants escape
12 over a period of years.

13 THE COURT: Let me -- point me to the
14 particular language that I can look at here.

15 MR. LEPORE: I don't have the jump cite, Your
16 Honor. I'm sorry.

17 THE COURT: Okay. Let me just look at it real
18 quick. Okay. "The better reasoned authority is to the
19 effect that when pollutants regularly have escaped over
20 a period of years, especially when management was either
21 deliberately indifferent to the situation or consciously
22 disregarded it, coverage is excluded under the policy
23 definition of occurrence because damage is to be
24 expected with a substantial degree of probability.
25 The better reasoned authority construing the sudden

1 and accidental language of the pollution exclusion
2 reaches a similar result."

3 MR. LEPORE: That's correct.

4 THE COURT: I see.

5 MR. LEPORE: And you won't find any Maryland
6 law to contradict that. In fact, the cases go on. With
7 respect to the ARTRA case, the Bentz case,
8 there's nothing unclear about sudden or accidental.
9 That's what they focus on.

10 THE COURT: Well, sudden and accidental are a
11 little bit --

12 MR. LEPORE: And I understand. But all I'm
13 saying is that they've assumed that the underlying issue
14 with respect to occurrence is not in dispute.

15 THE COURT: Right. So, let me take this part
16 of it: That you are entitled to take the position
17 that unless they say that this was the result of an
18 occurrence as defined by Maryland law, you don't have to
19 provide a defense. They have to show you in some
20 fashion that it was an occurrence.

21 MR. LEPORE: Yes. There has to be something
22 in the underlying documents.

23 THE COURT: What else? I just want to move
24 on. I understand that argument. I want to move on to
25 anything else on that.

1 MR. LEPORE: No.

2 THE COURT: Okay. So, Mr. Pirozzolo?

3 MR. LEPORE: Thank you, Your Honor.

4 MR. PIROZZOLO: Your Honor, a few points.

5 First of all, I'd like to emphasize the charging
6 document, which is the thing that came with the
7 invitations. And that appears at Appendix 28-XXVII-79.
8 And it has Black & Decker's -- the claim against Black &
9 Decker. And it says, "Black & Decker's a PRP at the
10 BROS by virtue of its having disposed of or arranged for
11 disposal of hazardous substances at the BROS superfund
12 site. Based on documents obtained from the Maryland
13 Department of Natural Resources as well as interviews
14 with former A&A waste oil drivers, it is understood that
15 Black & Decker disposed of some or all of its hazardous
16 waste through A&A, a bulk from Maryland. A&A waste oil
17 bulk, Maryland. Maryland disposed of some, if not all,
18 of its hazardous waste that it collected at the BROS
19 superfund site." That is without time. And, therefore,
20 the potentiality of liability is there on the face of
21 the charging document.

22 THE COURT: Okay. You're treating the Hyatt
23 letter as the charging document?

24 MR. PIROZZOLO: Well, that's certainly a
25 reasonable place to go.

1 THE COURT: Okay. But now let's talk about
2 the occurrence aspect of this. What is described in the
3 underlying complaints which Mr. Hyatt's letter forwards
4 is, at least as I recall -- I haven't gone back and
5 looked at it this carefully. I went through that aspect
6 of it carefully. I went through them very quickly. But
7 it raises some questions about whether or not what was
8 involved here is an occurrence, doesn't it, within the --

9 MR. PIROZZOLO: We're in an anomalous
10 position. In a sense, there's no occurrence because our
11 stuff never went there.

12 THE COURT: Oh, no. This is -- that may be
13 so. But you have to show that somebody is saying -- it
14 seems to me you have to show that somebody is saying --
15 making the argument, exposing you to risk that you
16 engaged in an occurrence.

17 MR. PIROZZOLO: I think that's what they're
18 saying. They're saying that A&A picked up our waste
19 and brought it to the BROS site.

20 THE COURT: Well, what do I do with that
21 language that I just recited from Alcolac?

22 MR. PIROZZOLO: The policy provides coverage
23 for continued -- repeated or continuous exposure to
24 conditions. And what we're dealing with is -- what Mr.
25 Lepore is talking about is well like a gradual leak or

1 something. But this is oil. The facts show, if they
2 were proven, that A&A came to Black & Decker and picked
3 up large loads of oil and then mixed it with other oil
4 at its facility in Maryland and then brought that to
5 BROS. That's not gradual. Those are specific --

6 THE COURT: But that's not the occurrence
7 either. The occurrence is the escape from the lagoon.
8 It sounds like a horror film. But that's what it's
9 about. That's what the occurrence is.

10 MR. PIROZZOLO: And if our oil is in the
11 lagoon and it escapes --

12 THE COURT: Right. But what do I do with
13 Judge Smalkin's language that "when pollutants regularly
14 have escaped over a period of years, especially when
15 management was either deliberately indifferent to the
16 situation or consciously disregarded it, coverage is
17 excluded under the policy definition of occurrence
18 because damage is to be expected with a substantial
19 degree of probability." What do I do with that? You
20 know, they're dumping into the lagoon. The lagoon is
21 leaking. He says that's not an occurrence.

22 MR. PIROZZOLO: I think you go to the policy
23 language. And the policy says it covers repeated
24 exposure to conditions and that is what the contractual
25 obligation is.

1 THE COURT: Is there anything -- any case law
2 or anything dealing with repeated exposure conditions as
3 distinguished from occurrence?

4 MR. PIROZZOLO: I think the insurer is
5 occurrence including -- I don't know if I'm quoting it.
6 It's approximately this. An occurrence including
7 continuous exposure to conditions.

8 THE COURT: Well, was Judge Smalkin dealing
9 with the same policy?

10 MR. PIROZZOLO: Maybe he wasn't dealing with
11 the same policy or maybe he was wrong. But the policy
12 very plainly covers and defines occurrence as including
13 continuous exposure to conditions. So, if we say the
14 leaking from the landfill into the swamp is the
15 occurrence, that is a continuous exposure to
16 conditions. And I would remind the Court there's some
17 secondary evidence that Liberty Mutual so interpreted
18 that because they have that brochure saying that if the
19 pollutant escapes and it goes into the river and it goes
20 downstream and it injures the cows and so on, that that
21 is continuous exposure to conditions.

22 THE COURT: All right.

23 MR. PIROZZOLO: The other point is that on the
24 duty to defend, the complaint is neutral as to how it
25 occurred, anyway. The complaint doesn't say that it

1 occurred continuously. It says that the complaint could
2 be read to say that A&A went to the site and dumped it
3 right into the swamp. The complaint does not specify
4 how the pollution occurred, anyway. So the duty to
5 defend -- in fact, what I was going to say to Mr.
6 Lepore's argument is that he really confuses the duty to
7 defend with the defense. It was Liberty Mutual's duty
8 to make the arguments that Black & Decker's waste did
9 not go to the site to make the arguments, if there are
10 arguments, that there's insufficient evidence that A&A
11 brought the Black & Decker waste to the site. That in
12 the course of providing a defense ourselves, we
13 discovered that. It doesn't militate against Liberty
14 Mutual having a duty to defend.

15 THE COURT: I don't disagree with that.
16 I guess I'm onboard on that. I'm more bothered, I
17 think, by the occurrence dimension to this, which is
18 what do you have to present them with? And you say the
19 plain vanilla complaints plus Mr. Hyatt's letter saying
20 you're within the heartland of these complaints. That's
21 enough.

22 MR. PIROZZOLO: There is the potential of
23 liability based on the complaints in the litigation along
24 with the invitation document that came to Black &
25 Decker.

1 THE COURT: Okay. Now, do you want to --

2 MR. PIROZZOLO: And that's enough for them to
3 -- we go to extrinsic evidence only to the extent that
4 it helps the insurer, not to the extent that it helps
5 the insured.

6 THE COURT: Well, some of the language says
7 that. I guess I treat it a little bit differently which
8 is -- and it comes out, I suppose, the same way. But it
9 is is there evidence from which a finder of fact could
10 find that there has taken place something for which
11 coverage would be provided?

12 MR. PIROZZOLO: I think there is.

13 THE COURT: I'd be very surprised if he said
14 it --

15 MR. PIROZZOLO: It apparently resolves the
16 issue.

17 THE COURT: No, it doesn't, but it -- well, it
18 would if you said no. Okay.

19 Now, let me step back a bit on this to
20 deal with the question of the role of the kind of
21 Hazen/Zecco, what is called Hazen/Zecco. I'm
22 sure that Judge O'Toole would like to be made equivalent
23 with the SJC on these issues. But --

24 MR. PIROZZOLO: Well, there again, I have some
25 disagreement with what Mr. Lepore says is uncontested.

1 First of all, this is characterized as an invitation.
2 Maybe we're dealing with southern hospitality. This is
3 a letter that says you join this -- and it's a letter
4 from the Court. Although it's transmitted by a
5 lawyer -- it's transmitted by a lawyer. It's a lawyer
6 transmitting the court order. And as the Court knows,
7 very often, a court order is transmitted through
8 counsel. So, it must fairly be read as a court order
9 that says "join the settlement process or be named as a
10 party." And that is a fairly coercive document saying
11 if you don't join, some unpleasant things are going to
12 occur.

13 Now, I believe -- I think it's quite clear --
14 that the Bausch & Lomb case decided by the Court of
15 Appeals in Maryland deals quite explicitly with this
16 kind of a situation. In that case, the party accused of
17 pollution was not under any state order. There was no
18 suit. There was no administrative proceeding. They
19 voluntarily complied with the need to clean up. The
20 operative language appears in the second column on page
21 five of the opinion where it says "B & L's Director of
22 Services wish to cooperate with the state in cleaning up
23 the Diecraft pollution and, in so doing, avoid being
24 subjected to an administrative order to perform the
25 work." And it then goes on to elaborate by saying that

1 "Bausch & Lomb's posture in its response to the Diecraft
2 pollution was one of uncontested compliance." At no
3 time does it state that any neighboring land owners sue
4 Bausch & Lomb for money damages or injunctive relief,
5 nor did the state file administrative procedures against
6 Bausch & Lomb or any writ to clean up the Diecraft
7 facility. At no time did the federal Environmental
8 Protection Agency ever send a PRP letter to Bausch &
9 Lomb designating it as a potentially responsible party
10 in regard to the pollution.

11 The trial court, in delivering its opinion in
12 that case said, "There is no question in my mind but
13 that the total circumstances constitute the sufficient
14 coerciveness and adversariness of an administrative
15 body and a degree of definiteness which indicate that
16 this was, in fact, a suit, a demand for damages and
17 money to a certain extent that the State had the right
18 to require it be paid. There was no question but that
19 they were going to require compliance and that Bausch &
20 Lomb did make that compliance. Now, that finding of the
21 trial court was not contested on appeal. It was the
22 trial court's opinion as reported in the appellate
23 decision, but it is not an issue raised on appeal. The
24 parties appear to have accepted that. And, therefore,
25 it does stand as authority in Maryland for the

1 proposition that circumstances certainly analogous to
2 this one and perhaps a little more distant from this one
3 where we have actually a communication from a court that
4 it was --

5 THE COURT: Well, you've made it a
6 communication from a court. I mean, Mr. Hyatt is
7 delivering a message, not quite the same as delivering
8 it from the court, but I recognize it as not an idle
9 form of correspondence.

10 MR. PIROZZOLO: Right. It's to be paid
11 attention to or consequences flow. And the consequences
12 are either they're made a party or, even worse, they're
13 not made a party and they don't get an opportunity to
14 participate in the PRP proceeding. They don't get an
15 opportunity to shape the record; they don't have an
16 opportunity to present their defenses; and they end up
17 exposed, after settlement, to liability from all the
18 unpaid amount that EPA can bring to the --

19 THE COURT: Well, but let's look at the Zecco
20 letter. I'm just trying to pull it out. Zecco receives
21 a letter from Marane Oil Corporation. Marane says that
22 Zecco caused a thousand-gallon sudden and accidental
23 release of petroleum products. Marane says that it's
24 taking the necessary and appropriate environmental
25 response actions at the site and says that Zecco is a

1 potentially responsible party, directs them to Chapter
2 21(e), and then indicates that the letter is formal
3 notification under 4(e) which is -- 4(a), excuse me,
4 which is designed to encourage people to settle cases,
5 settle environmental liability suits without formal
6 litigation proceedings. Now, isn't that more or less --
7 but on a grander scale -- what Mr. Hyatt's letter is?

8 MR. PIROZZOLO: I think the fact that Mr.
9 Hyatt's letter transmits a court order makes it
10 substantially different from the Zecco. Zecco is made a
11 private party proceeding.

12 THE COURT: Well, there are court orders and
13 there are court orders. This is a court order for
14 essentially the organizational litigation.

15 MR. PIROZZOLO: And also saying that you'll be
16 made a party if you don't take the settlement.

17 THE COURT: You can be made a party.

18 MR. PIROZZOLO: In lieu of -- the letter says
19 "in lieu of being made a party" which fairly suggests
20 that if they don't participate, they're going to be made
21 a party. I would say that it's much more like a summons
22 with an opportunity to participate in something.

23 THE COURT: Well, I guess it's not -- I guess
24 it's whatever it is. I mean, it's not a summons and
25 it's not an RSVP.

1 MR. PIROZZOLO: But it does meet the standard
2 -- as is stated in the Bausch & Lomb case -- of
3 coerciveness, constitutes sufficient coerciveness and
4 adversariness to make it the functional equivalent of
5 a suit.

6 I would point out, Your Honor, to this case we
7 haven't previously cited because it's a new case. It
8 was Johnson Controls, a Wisconsin case.

9 THE COURT: Hold on just a second.

10 MR. PIROZZOLO: A Wisconsin case cited on July
11 11th of this year.

12 THE COURT: A Wisconsin case?

13 MR. PIROZZOLO: Yes, which reviews in great
14 detail this kind of situation and the policy involved.
15 It reverses an earlier Wisconsin case which applied a
16 very strict rule as to what constitutes --

17 THE COURT: What's the cite for it?

18 MR. PIROZZOLO: The cite is 665 NW.2d 257.
19 And it contains a very extensive discussion of the
20 policy behind considering a PRP letter to be the
21 functional equivalent of a suit and the rationale behind
22 that. And if you take from that case -- I don't want to
23 burden the Court by reading quotations from it. But if
24 we take the rationale of that case in terms of what
25 parties ought to be doing in this kind of unique

1 pollution type of environment and apply it to the BROS
2 situation, I think it argues that the BROS situation
3 fairly fits the functional equivalent of a suit.

4 THE COURT: Well, I'll look at it. It
5 obviously is not --

6 MR. PIROZZOLO: The main thing -- and I
7 emphasize one point. Because what you're dealing with
8 is what would flow from a conclusion that this was not a
9 functional equivalent of suit. It would mean that in
10 order to get insurance coverage, a party would have to
11 avoid discussing settlement at all, refuse to discuss
12 settlement, and cause a case to be brought. And this
13 case says, well, that doesn't make good sense.

14 THE COURT: And that certainly is the policy
15 that a number of the cases have dealt with. On the
16 other hand, inchoate diffuse and uncertain importunings
17 by private parties don't constitute a suit either, nor
18 in fact should they as a policy matter. Because all
19 we're doing is increasing cost of insurance by doing
20 that everytime somebody sends a threat across the --

21 MR. PIROZZOLO: But that's not anybody. We
22 have here in this case an ongoing proceeding --

23 THE COURT: I understand. I understand the
24 distinction. And I think we've exhausted the discussion
25 with respect to that.

1 MR. PIROZZOLO: This is deliberate
2 non-compliance for the purpose of obtaining a defense
3 from an insurer. It's completely contrary to public
4 policy. And that would be what would flow from that.
5 The other thing I would emphasize a little bit -- and
6 it's in our brief and it's in the appendix -- is that
7 Liberty Mutual's own statement about this -- and it says
8 "the most powerful law regulating this" -- this is a
9 Liberty Mutual document. It is the EPA. Several
10 federal laws on how the EPA with widespread authority --
11 and it goes through the tremendous power of the EPA.
12 And then it advises that "litigation has been lengthy,
13 expensive, and generally unsuccessful from the
14 standpoint of the generators. It is usually in the best
15 interest of the generators, therefore, to unite while
16 cooperating with the EPA in negotiating an agreement for
17 a remedial action plan and a dump site." Now, this is
18 exactly what's involved here, is the generators are
19 being called together to unite to work out a settlement
20 in connection with the claim for remediation of the dump
21 site. And that's what Liberty Mutual itself says the
22 generators should be doing.

23 So, in this case, to stand on the argument
24 that there must be a formal suit is really arguing for
25 something that's contrary to its own advice, let alone

1 public policy.

2 THE COURT: Well, I understand the -- I think
3 I understand those issues.

4 I do want to move on, however, to the
5 relatively more modest, but I think somewhat
6 distinguishable, circumstances unless there's something
7 else that people want to say about BROS --

8 MR. PIROZZOLO: No.

9 THE COURT: -- with respect to Burke's and
10 Huth there. Is there anything else that we haven't
11 touched on in discussing --

12 MR. PIROZZOLO: I think that's all in the
13 papers, Your Honor. And our view is very, very clear.
14 There are no arguments on those.

15 THE COURT: Okay. Let me just hear such as
16 you have.

17 MR. LEPORE: I didn't know we were going to
18 argue Burke's, Your Honor --

19 THE COURT: Okay. Then I will treat it --

20 MR. LEPORE: -- I mean, Jack Huth. And I am
21 not prepared to do that.

22 THE COURT: Okay. Well, then --

23 MR. LEPORE: I thought that that was going to
24 be a tier-2 site that we were going to hold in abeyance.

25 THE COURT: Well, I'm prepared for both of

1 them, but I am not going to --

2 MR. LEPORE: Okay. Thank you, Your Honor.

3 THE COURT: -- force that issue.

4 Now, as I understand it, then, I will be
5 getting two weeks --

6 MR. LEPORE: Yes.

7 THE COURT: -- from today materials. And I
8 think they should be cross -- you understand the issues,
9 so they should be cross-filed --

10 MR. LEPORE: Yes.

11 THE COURT: -- on the excess policy that is
12 said to exist from '70 to '73 --

13 MR. LEPORE: Yes.

14 THE COURT: -- and its implications here,
15 and particularly its implications of duty to defend.
16 Because duty to defend is what I'm focusing on here.
17 In an effort to find if there are any places where summary
18 judgment can be granted, I'm focusing on the duty to
19 defend, which seems to me to be the broader set of
20 responsibilities that Liberty has. So that would be --
21 why don't we say September 12th? That's generously
22 offering you two more days to deal with that. Okay.

23 Then I will intend to take up the Beverly
24 case sometime toward the end of October.

25 MR. LEPORE: Yes.

1 THE COURT: If I were to say -- your first
2 briefing in Beverly is September 5th?

3 MR. LEPORE: September 5, yes.

4 OFF THE RECORD

5 THE COURT: I think I'm going to have make it
6 November 5th at 2:30 to deal with Beverly -- you know,
7 best laid plans and so on. I think that by that time or
8 shortly thereafter, it will be pretty clear to me what
9 the broad outlines of things that are in dispute are.
10 And then we can focus the question of how to deal with
11 trial for these. Because it's clear to me that there
12 are tryable issues in various aspects of this case and
13 I've got to figure out exactly how to deal with those.

14 MR. PIROZZOLO: Your Honor, just in terms of
15 long-range scheduling --

16 THE COURT: Right.

17 MR. PIROZZOLO: I'd just report to the Court
18 that I now have a fairly lengthy trial scheduled to
19 begin on November 24th before Judge Zobel. So that I
20 just will be engaged, I believe, mornings before her.

21 THE COURT: What is the -- we set a time, I
22 though, in the beginning of the year for --

23 MR. LEPORE: January 5.

24 MR. PIROZZOLO: January 5. We're not going to
25 that try the -- that trial will not run into the trial,

1 Your Honor, that was set.

2 THE COURT: Okay.

3 MR. PIROZZOLO: But in terms of the
4 preliminary pretrial memorandum, pretrial hearing
5 conference and so on, I think I'm only available, while
6 that trial is going on, in the afternoon.

7 THE COURT: Okay.

8 MR. PIROZZOLO: And I certainly would like to
9 get as much business as possible done before that
10 starts.

11 THE COURT: Sure. Well, I think we probably
12 will be in a position to start talking this through by
13 -- I'd like to say mid-October. Things will be in
14 pretty good -- I think in pretty shape for me what I
15 can try reasonably and what would simply be a kind of
16 dog's breakfast of a trial and, consequently, not
17 comprehensible to a single jury. So, I may be trying to
18 parse it up in some ways do deal with it.

19 Now, you had a matter in Florida, was it?

20 MR. LEPORE: Houston, Your Honor. It's
21 scheduled still for January 5. But there is actually a
22 status conference in three weeks and I'll know much
23 better then, Your Honor.

24 THE COURT: All right. But I still have that
25 time blocked out.

1 MR. LEPORE: Yes.

2 THE COURT: Your Honor, may I -- and I don't
3 want to revisit anything, but I just would ask. Your
4 Honor just mentioned something about that you're going
5 to be focusing on the duty to defend. And I understand
6 perfectly well why you want to do that. Under Maryland
7 law, I would just ask you to take a look at the
8 Baltimore Gas and Electric case, Your Honor, which
9 is 113 Md.App 540.

10 THE COURT: Hold on a second.

11 MR. LEPORE: And I think I gave you that
12 earlier --

13 THE COURT: This is the Northern Insurance v.
14 Baltimore?

15 MR. LEPORE: No. This is Baltimore Gas v.
16 Commercial Union. And the --

17 THE COURT: Give me the cite again.

18 MR. LEPORE: The second cite is 688A.2d --

19 THE COURT: 688A --

20 MR. LEPORE: -- 2d 496. And it's a Maryland
21 special appellate decision of 1997. And all it stands
22 for -- I'm not going to get into argument about it -- is
23 that Maryland recognizes that an insurer's duty to
24 defend can terminate at some point. It's not a forever
25 thing. And, so, when you're dealing with that duty to